

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MELVIN DUKES,

No. C 09-04579 SBA (PR)

Plaintiff,

ORDER OF DISMISSAL

v.

J. SELBIL, et al.,

Defendants.

Plaintiff, a state prisoner, filed this pro se civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California. In an Order dated September 4, 2009, Magistrate Judge Dale A. Drozd of the Eastern District ordered it transferred to this Court on venue grounds.¹

On October 1, 2009, the instant case was received by this Court. On that same date, the Clerk of the Court sent Plaintiff a notice that this case had been transferred to this Court. The Clerk's notice was returned as undeliverable with a notation: "Return to Sender -- Inmate Refused."

In an Order dated October 26, 2009, the Court directed Plaintiff to inform the Court of his continued intent to prosecute this action. The Court informed Plaintiff that if he failed to do so within thirty days, this action would be dismissed without prejudice for failure to prosecute. The Order was sent to Plaintiff at his last known address, Salinas Valley State Prison, and it was not returned as undeliverable.

More than thirty days have passed, and Plaintiff has filed no response to the Court's October 26, 2009 Order. He has failed to communicate with the Court since this case has been transferred to this district. A district court may sua sponte dismiss an action for failure to prosecute or to comply with a court order pursuant to Federal Rule of Civil Procedure 41(b). See Link v. Wabash R.R., 370 U.S. 626, 633 (1962); McKeever v. Block, 932 F.2d 795, 797 (9th Cir. 1991). The court should

¹ Magistrate Judge Drozd indicated that he was construing Plaintiff's action as a civil rights action, stating: "Plaintiff has used the form for a petition for a writ of habeas corpus in his initial pleading filed with the court. However, he does not challenge his underlying conviction therein and the court has construed the filing as a civil rights complaint." (Sept. 4, 2009 Order at 1 n.1.)


1 consider five factors before dismissing an action under Rule 41(b): (1) the public interest in the
2 expeditious resolution of the litigation; (2) the court's need to manage its docket; (3) the risk of
3 prejudice to the defendants; (4) the availability of less drastic sanctions; and (5) the public policy
4 favoring the disposition of actions on their merits. See Malone v. United States Postal Serv., 833
5 F.2d 128, 130 (9th Cir. 1987).² The first three factors, above, weigh in favor of dismissal in light of
6 the fact that Plaintiff has not pursued this matter since it has been transferred to this district. In
7 addition, he has refused one notice from the Clerk and failed to respond to the Court's October 26,
8 2009 Order. The fourth factor also weighs in favor of dismissal because less drastic sanctions would
9 have little impact in light of Plaintiff's apparent lack of interest in this case. Although the fifth factor
10 appears to weigh against dismissal, dismissal is appropriate in light of the other four factors. See
11 Pagtalunan v. Galaza, 291 F.3d 639, 643 (9th Cir. 2002) (finding district court did not abuse its
12 discretion in dismissing petition with prejudice where three of the five factors weighed in favor of
13 dismissal).

14 In light of the foregoing, this action is hereby DISMISSED for failure to prosecute, pursuant
15 to Federal Rule of Civil Procedure 41(b).

16 The Clerk of the Court shall close the file and terminate any pending motions.

17 IT IS SO ORDERED.

18 DATED: 12/3/09


SAUNDRA BROWN ARMSTRONG
United States District Judge

26 _____
27 ² The court should also afford the litigant prior notice of its intention to dismiss, id. at 133, as
28 this Court has done.

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 MELVIN DUKES,

5 Plaintiff,

6 v.

7 J SELBIL et al,

8 Defendant.

Case Number: CV09-04579 SBA

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on December 4, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 Melvin Dukes D-33572
16 Salinas Valley State Prison (1050)
17 P.O. Box 1050
18 Soledad, CA 93960-1050

19 Dated: December 4, 2009

20 Richard W. Wieking, Clerk
21 By: LISA R CLARK, Deputy Clerk
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